employed by his attorney to help him with his work.[18] This rule should apply in the case where a person seeks the service of an attorney who has large offices and numerous attorneys working for him and helping in the preparation of his cases. A knowledge by the client of the nature of the attorney's business should be presumed, and from this should be implied an assent, in the absence of an agreement expressly providing otherwise, that the attorney carry on this case in the way he ordinarily handles cases, and charge the client for the services of the other attorneys working under him.[19] This is the only way an attorney employed to assist the client's counsel can protect his rights if the counsel hiring him absconds or becomes bankrupt. But, in the case of a firm of lawyers, or of the hiring of an office assistant, although the client is, as has been shown, liable for the services of the other members of the firm, or of the office assistant, his liability is to the firm, or to the attorney hired. The redress of the partner or office assistant, as the case may be, must ordinarily be against the party hiring him, especially if he is not the party conducting the case and determining discretionary matters, but is clearly a subagent acting under the control of one other than the client.

It would seem that since there are so many exceptions to any rule that can be stated against the right of an attorney to subject his client to liability for his hiring of assistant or associate counsel, it would be more in harmony with the actual situation to say that whether an attorney may thus subject his client to liability is a question to be determined by a consideration of all of the circumstances surrounding such employment. *V. L. K.*

BAILMENTS: DAMAGES: MEASURE OF DAMAGES IN A SUIT BY A BAILEE—The right of a bailee to recover full damages for injury to goods while in his possession, except where there is an agreement to the contrary, is established as California law by the case of *Whitworth v. Jones*.[1] Though new to the California courts,[2] the doctrine represents the orthodox view, which, however, has been the subject of much academic discussion. In such a proceeding the question

[18] Kingsbury v. Joseph (1902) 94 Mo. App. 298, 68 S. W. 93; Briggs v. Georgia (1838) 10 Vt. 68.

[19] Eggleston v. Boardman (1877) 37 Mich. 14: "Under the retainer of an attorney or a firm of attorneys, much of the business necessarily to be done in the preparation of a cause may be done by them or anyone in their employ and under their direction, and it will be found extremely difficult to draw the line and say just what must be performed by the person or firm retained and what may be done under their direction by persons in their employ."

[1] (July 10, 1922) 38 C. A. D. 601.

[2] The court cites no California authority to support the proposition, and no California case in point has been found. However, in Bode v. Lee (1894) 102 Cal. 583, 590, 36 Pac. 936, where due to wrongful sales by his agent a bailee had been required to reimburse the bailor, though there was no contest on this particular point, the court approved the instruction of the lower court to the effect that "the plaintiffs could recover only such damages as they had sustained as bailees of the tin, and that if they had settled with their bailors, they could recover only such amount as they had paid in such settlement, not

of title is wholly immaterial, the bailee's action being based upon his possession or immediate right to possession.[3] Since the wrongdoer can raise no question of title as against an injured party in possession, the bailee may recover full damages,[4] and such recovery bars any suit by the bailor;[5] but the excess over the amount that is an injury to his interest he holds as trustee for the owner or bailor.[6] This rule undoubtedly does not apply where the bailor objects to the bailee's full recovery, in which case the bailee should recover only for the injury to his interest.[7] The general rule has

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exceeding the actual value of the tin." This decision would seem to imply that the bailee could not recover for any injury which is not an injury to his interest. The case has not been followed or clarified by subsequent decisions.

[3] Rooth v. Wilson (1817) 1 B. & Ald. 59, 1 Gray, Cases on Property, 256; Conrad v. Pacific Insurance Co. (1832) 6 Pet. 262, 8 L. Ed. 392; Guttner v. Pacific Steam Whaling Co. (1899) 96 Fed. 617; Gibbs v. Chase (1813) 10 Mass. 125; Wooley v. Edson (1862) 35 Vt. 214; Wustland v. Potter (1876) 9 W. Va. 438. See also Pollock on Torts, p. 371, and cases there cited, to the effect that this rule may rest either on the theory that " 'the presumption of the law is that the person who has possession has the property,' or that for the sake of public peace and security, and as 'an extension of that protection which the law throws around the person,' the existing possession is protected."

[4] Union Pacific Railroad Co. v. Meyer (1906) 76 Neb. 549, 107 N. W. 793, 14 A. & E. Ann. Cas. 634, note; Littlefield v. Biddeford (1849) 29 Me. 310; Woodman v. Notingham (1870) 49 N. H. 387, 6 Am. Rep. 536; Ullman v. Barnard (1856) 7 Gray (Mass.) 554; National Security Co. v. U. S. (1904) 129 Fed. 70, 63 C. C. A. 512; Brewster v. Warner (1883) 136 Mass. 57, 49 Am. Rep. 5; United States Fidelity & Guaranty Co. v. United States (1917) 246 Fed. 433; Van Zile on Bailments, § 58.

[5] Story on Bailments, § 94; Knight v. Davis Carriage Co. (1896) 71 Fed. 662, 668; Harrington v. King (1876) 121 Mass. 269. It has been objected that allowing such a judgment to be *res judicata* on the bailor's rights is unfair because the bailee might not have presented as strong a case as the bailor could have, and thus the damage recovered might be less. The right to sue for all the damages is, however, given to the bailee as a matter of convenience because he is, generally, in a better position to prove the facts of the case, and it would seem unnecessary that the whole question of fact involved should be proved twice. If the bailor wished to protect his rights he could either object to the bailee's suit or join with the bailee as a party plaintiff. This would protect the bailor except in the unusual case where he does not know of the injury. See infra, notes 7, 31.

[6] Pabst Co. v. Greenberg (1902) 117 Fed. 135, 55 C. C. A. 151; Treadwell v. Davis (1868) 34 Cal. 601, 94 Am. Dec. 770; Finn v. W. R. R. (1873) 112 Mass. 524, 17 Am. Rep. 128; The Charlotte [1908] P. 206, 77 L. J. P. 132, 99 L. T. 380, 24 L. T. R. 416; White v. Webb (1842) 15 Conn. 302; Atkins v. Moore (1876) 82 Ill. 240; 1 Sedgwick on Damages, 120. To consider the bailee as holding the fund as agent for the bailor, rather than as trustee, would adequately protect the bailor, and would, it is submitted, obviate the necessity of determining what kind of a trust is involved. In many cases it would be very difficult to set up a trust. Furthermore, in the English cases the remedy given to the bailor is an action of account, rather than for breach of trust.

[7] See Salmond on Torts (5th ed.) p. 372: "It is a good defense to a claim for value made by a plaintiff with a limited interest, that a claim has already been made on the defendant by another person interested in the property. It is settled that this is a good plea in an action brought by a plaintiff with a merely possessory interest, and there seems no reason why it should be less effective in a claim by a plaintiff with a limited interest for damages in excess of that interest."

been applied so as to allow suits for full damages by gratuitous depositaries,[8] borrowers,[9] under-bailees,[10] consignors,[11] sheriffs,[12] tailors,[13] lien holders,[14] pledgees,[15] factors,[16] innkeepers,[17] finders,[18] and even by wrongful possessors.[19]

The doctrine had its origin, so Justice Holmes maintains,[20] in the early practice of allowing the caretaker or bailee to sue as a means of checking the practice of cattle-stealing. Thus the theory was evolved that the party in possession, or whose possession was disturbed, was the only person who could sue. Out of this grew the doctrine that "the bailee was answerable to the owner because he was the only person who could sue." Later, however, the right of the bailor to sue to protect his title and ownership was recognized, and by a strange inversion of reasoning it was held that "the bailee could sue because he was answerable to the owner."[21] In the latter form we find the doctrine stated as early as the fifteenth century. In the eighteenth century we find well established the rule that a stranger or wrongdoer may recover the full value of property wrongfully taken from his possession,[22] because to hold otherwise would be, in the words of Lord Kenyon: "an invitation to all the world to scramble for the possession."[23] This doctrine should apply equally to the bailee; his position should be

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[8] Sutton v. Buck (1810) 2 Taunt. 302; Moran v. Portland Steam Packet Co. (1852) 35 Me. 55; Rooth v. Wilson (1817) 1 B. & Ald. 59; Burton v. Hughes (1824) 2 Bing. 173.

[9] Holmes, "The Common Law," pp. 173, 174.

[10] Pollock on Torts (8th ed.) p. 373.

[11] Finn v. W. R. R. (1873) 112 Mass. 524, 17 Am. Rep. 128; The Charlotte, supra, n. 6.

[12] Buck v. Remsen (1866) 34 N. Y. 383; Burk v. Webb (1875) 32 Mich. 173; Robinson v. Ensign (1856) 6 Gray (Mass.) 300.

[13] Ballantine on Personal Property and Bailments, § 79, in 4 Modern American Law, 79.

[14] Davidson v. Gunsolly (1850) 1 Mich. 388; Arnd v. Amling (1879) 53 Md. 192; Hill v. Lano (1881) 53 Vt. 629.

[15] Soule v. White (1837) 14 Me. 436; Adams v. O'Connor (1868) 100 Mass. 515, 1 Am. Rep. 137; Mechanics' & Traders' Bank v. Farmers' & Mechanics' Bank (1875) 60 N. Y. 40.

[16] Groover v. Warfield (1874) 50 Ga. 644.

[17] See supra, n. 12.

[18] Armory v. Delamirie (1722) 1 Stra. 504.

[19] Asher v. Whitlock (1865) L. R. 1 Q. B. 1, 35 L. J. Q. B. 17; Perry v. Clissold [1907] A. C. 73.

[20] Holmes, "Common Law," pp. 168-180. See Bevins on Negligence (3d ed.) p. 736, where the correctness of this view is questioned.

[21] (1410) Y. B. 11 Hen. IV 23, 24; (1506) Y. B. 21 Hen. VII 14 b. pl. 23; Heydon and Smith's Case (1610) 13 Co. Rep. 67, 69; Pollock and Maitland's "History of English Law," vol. 2, p. 170. Quoting Heydon and Smith's Case: "Clearly the bailee, or he who hath a special authority, shall have a general action of trespass against a stranger, and he shall recover all the damages because that he is chargeable over." Also, in Moses v. MacFerlan (1760) 2 Burr. 1005, it is held tht a bailee "shall have an action of trespass *quare clausem fregit* for the cutting of the trees, but he shall not recover the value of the trees, because he is not chargeable over, but he shall recover for the special loss which he hath."

[22] Armory v. Delamirie (1722) 1 Stra. 504.

[23] Webb v. Fox (1797) 7 T. R. 387, 393.

at least as secure as that of the finder, wrongdoer, or adverse possessor, though some of the leading text-writers seem to incline to the contrary view.[24] For some time, however, courts found difficulty in granting full recovery where there was no wrong or responsibility on the part of the bailee to the bailor. This is reflected in Claridge v. S. S. Tramway Co.,[25] where the court held that if the injury to property occurred under such circumstances as to relieve the bailee of legal responsibility to the owner, he could recover only for the injury to his interest. Ten years later, however, in The Winkfield,[26] this case was expressly overruled and the old doctrine of Armory v. Delamirie[27] re-established. This is a final application to the bailee of the doctrine so long recognized with respect to possessors in general, that "as against a wrongdoer, possession is title."[28] The Anglo-American law is apparently the same whether the article has been injured, totally destroyed, or converted by a third person while it was in the possession of a bailee. The bailor is protected, it is said, by the right to demand an accounting from the bailee, but to make that really effective the jury in the suit by the bailee against the third person ought to itemize its verdict and declare what part represented the prejudice caused the bailee and what part the injury to the bailor.

It may be that the "inversion of the old common law theory" which Holmes ascribed to Beaumanoir,[29] and which is the basis of Ellenborough's opinion in Rooth v. Wilson,[30] viz., that the bailee's right to sue depends on the accountability to the bailor, depends equally on the Roman law,[31] where the right of the *dominus* to pursue goods stolen from his bailee depends entirely on the existence or effectiveness of his remedy against the bailee to have them restored. If goods left with a tailor are stolen, the tailor alone has the *actio furti* against the thief, unless the tailor is insolvent at the time, in which case the owner has that action. In the case of a gratuitous loan the owner is put to his election whether he will sue the bailee if the bailee has been negligent, or the thief. There is certainly much to be said for a rule that takes into consideration such a sordid and commonplace fact as the solvency of a judgment-debtor. In the case of an injury to property under the *lex Aquilia,* the general rule was that only the *dominus* might sue the delinquent, not the bailee. However, if the bailee had an interest in the thing itself, such as a usufruct or a lien, he might sue for the prejudice caused him. The gratuitous borrower certainly had no action and there is some question

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[24] See Clerk & Lindsell on Torts (7th ed.) p. 276.
[25] [1892] 1 Q. B. 422, 18 T. L. R. 178. See 6 Harvard Law Review 156.
[26] [1902] P. 42. See 2 Columbia Law Review, 324; 15 Harvard Law Review, 585.
[27] Supra, n. 22.
[28] Jeffries v. Railway Co. (1856) 5 E. & B. 802, 806; Giles v. Grover (1832) 1 Cl. & F. 72, 203.
[29] Supra, n. 20.
[30] Supra, n. 3.
[31] Justinian, Inst. iv, 1, 15, seq.

whether the conductor (lessee or hirer) did, at least in general.

Under the generalized tort actions of the modern civil law[32] it is only the party injured that may sue, and only for reparation to the injury caused him. That would exclude the bailee unless he was prejudiced, and then only to the amount of his prejudice. The rule *mobilia non habent sequelam,* adopted by the French Code,[33] was always interpreted not to protect the *mala fide* acquirer. and consequently enabled the *dominus* to sue such a holder. We must remember, however, that possession in this case is the Roman possession, even more severely restricted than at Rome, and not the mere detention which is all that is accorded to lessees, depositaries, borrowers, and even to pledgees.

It has been contended that the rule of the Roman Law should apply, and the bailee should not be allowed to recover full damages because then he might abscond and leave the bailor remediless,[34] or the bailor might be subjected to additional difficulties in enforcing his right to an accounting against the bailor; and in a few states he is, therefore, allowed to recover only his special damage.[35] However, the weight of authority and the balance of convenience favor the allowance of full damages in a suit by the bailee.[36] It is by the authority of the bailor that the bailee has been placed in a position where he can maintain this suit, and the bailor should be deemed to have contracted in contemplation of this contingency unless he protests against the bailee's action and brings suit in his own name, or provides in the bailment contract that the bailee shall sue only for his own injuries. Furthermore, the prevailing procedure generally prevents circuity of action. *V. L. K.*

BANKS AND BANKING: WRONGFUL DISHONOR OF COMMERCIAL CHECK AS PROXIMATE CAUSE OF ARREST OF DRAWER BY PAYEE—The case of *Bearden v. Bank of Italy*[1] presents an interesting question. Plaintiff drew an ordinary commercial check upon defendant bank where she had sufficient funds, in her commercial account, to cover the check. When the check was presented by the payees for payment, the defendant bank refused to honor the check, informing the payees that the plaintiff had not sufficient funds to cover the check. The payees, after four unsuccessful attempts to collect the check, told the bank that they were going to have the plaintiff arrested. This was done, and the plaintiff here sues the defendant bank for negligently, wilfully and maliciously refusing to honor her check, thereby causing her arrest with consequent alleged injury. The court denied her any damages, basing its opinion entirely upon

[32] French Code Civil, 1382, German Code, 823, Swiss Fed. Code, Art. 50.

[33] French Code Civil, 2279, *en fait de meubles possession vaut titre.*

[34] 25 Harvard Law Review, 655; Clerk, "Title to Chattels by Possession' in 7 L. Q. R. 224, 227.

[35] Weber v. Henry (1868) 16 Mich. 399; Darling v. Tegler (1874) 30 Mich. 54; Lockhart v. Western & Atlantic Railroad Co. (1885) 73 Ga. 472.

[36] 2 Columbia Law Review, 324.

[1] (April 18, 1922) 37 C. A. D. 874, 207 Pac. 270.